United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2448

ORIGINAL

To be argued by
JULIA P. HEIT

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P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

- against -

RAMON GARCIA,

Appellant.

APPELLANT'S BRIEF

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STATEMENT PURSUANT TO RULE 28 (3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered November 7, 1974 in the United States District Court for the Southern District (Cannella, J.) convicting Appellant Garcia after trial of conspiring to violate the Dyre Act (Title 18 U.S.C. Sections 2312, 2313) and two counts of violating Title 18 U.S.C. Section 2313 in that he concealed or sold a motor vehicle knowing the same to have been stolen. Appellant Garcia was sentenced to serve a two-year term on each count, said sentences to run concurrently.

QUESTION PRESENTED

Whether the court erred in refusing to suppress Appellant Garcia's Grand Jury testimony in light of the fact that the Government ignored his attempt to invoke his Fifth Amendment privilege before the Grand Jury.

STATEMENT OF FACTS

On September 19, 1974, Appellant Garcia and three co-defendants proceeded to trial before the Hon. John M. Cannella on an indictment charging them with conspiracy in that from January 1, 1972 to March 29, 1974 they conspired to steal or would cause to be stolen motor vehicles in states other than New York and would transport said motor vehicles in interstate commerce into the State of New York. As part of said conspiracy, it was further charged that after altering the appearance of the automobiles or obliterating the confidential vehicle identification numbers of said autos, the defendants would sell or otherwise dispose of these vehicles. Appellant Garcia was also charged with three separate counts of concealing or selling a motor vehicle knowing the same to have been stolen in violation of Title 18 U.S.C. Section 2313.*

Four witnesses were presented by the Government who testified that their cars had been stolen.

RAMON HERNANDEZ lived in Bridgeport, Connecticut on November 18, 1972 and at that time owned a blue 1964 Cadillac which had Connecticut license plates. (95)** He next saw his car, which was then painted red and grey, in the Whitestone Pound in Queens with Officer Torrens on March 16, 1973. A receipt with the words "Schweitzer Hardware Inc., Electrical Supplies, 1228 Main Street, Bridgeport, Connecticut" had been found in the car

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*Indictment is set out in its entirety in the Appendix, A.5-10.
**Numerical references are to the pages of the trial transcript.

by Patrolman Torren and Mr. Hernandez verified that he had in fact bought some plumbing at this store. (100)

On December 30, 1972, WALTER DONALD SHAW resided in South Norwalk, Connecticut and owned a 1957 white Ford Thunderbird which had been registered in the State of California under his name. (82-83) On December 30, 1972, his car was stolen from a parking area adjacent to the Stamford Connecticut railway station. (85) Thereafter, on August 30, 1973, he again saw his car in the Whitestone Pound when he was brought there by a Special Agent. (86-87) His credit card receipts with his signature and credit card numbers had been found under the seat of the car. (87)

On March 14, 1972, NUNZIO J. CELONA was living with his in-laws in East Boston, Massachusetts and owned a 1971 Dodge Dart Swinger which was registered in his name in Massachusetts. On that date, his car was stolen from in front of 88 Faywood Avenue in East Boston. A cost center pamphlet which he had left in the car was later found by the Agents. (167-68, 171)

A stipulation was then entered among the parties that RONALD LESLIE was the owner of a 1967 Mercury Cougar which was stolen in Bridgeport, Connecticut on February 6, 1973. This car had been registered in Connecticut. (175)

NORBERTO RAMOS testified that he knew Defendant LeCleres who was also known by the name of Paito. (240) He first met Paito between May and June of 1972 at his sister's home in Connecticut when he got out of the city jail where he had been serving ten months for"fighting". (242) Louis Gonzales, his sister's common-law husband, was the one who introduced him to Paito. (242-43)

Paito told him that they could make good money stealing cars but Ramos at first refused since he had just gotten out of jail. (242) However, a few weeks later he again saw Paito at his sister's house. (245-46) Paito at this time explained that he had several people working for him who would steal cars. He would then change the serial numbers on these stolen cars and sell them. (246) Ramos at that point agreed to participate in this enterprise.

He thereafter met Defendant Matos, Juanito Perez, and "Gato" who were also working for Paito. (248) When he stole a car in Connecticut, he would bring it to the R&R Auto Repair Shop on Wales Street in New York and deliver it to Paito. (254-56) At the garage, he met Appellant Garcia whom he knew as "Ralphie". He also saw the Defendant Baez at the garage. (254)

From the summer of 1972 to February of 1973 he stole several hundred cars for Paito. (260) Paito would give him instructions as to what kind of car to steal such as the year and model. (262, 265) Occasionally, he would steal cars with Paito, Perez, Gonzales, and Matos. (263) Ramos also stated that on several occasions he took cars to the P&P Garage on Melrose Avenue. (276) There he saw the Defendant Ortas. However, most of the time the cars were taken to the R&R Garage. No one other than Paito paid him but Appellant Garcia and Defendant Ortas were present when he was paid. (285) Once Paito got money from Appellant Garcia to give to him. (288)

After he arrived at either the R&R Garage or the P&P Garage, he and Paito would remove the Connecticut plates from the stolen

cars and put New York plates on these cars. (301)

Once in November of 1972, he delivered a Cadillac to the R&R Garage which was not to be sold but was to be used only for parts. (327) When he brought the car from Connecticut to New York, he turned it over to Paito. (324) Paito, in response to his question, told him that they had a white Cadillac that was parked in the R&R Garage and that they were going to use the fenders and the parts from the stolen car to repair the other car which was legally bought. (328)

According to Ramos, he saw a Corvette Stingray being worked on in the R&R Garage and Appellant Garcia told him that it was his car and he was fixing it in order to sell it. (333) The witness stated that he could be wrong but that he thought Appellant Garcia told him that this car had been stolen in Florida from in front of a high school. (334)

The last car which he delivered from Connecticut to New York was a 1967 green Mercury Cougar. (338) Paito had asked him to get such a car and he got the car from Milford, Connecticut when a young lady left the car to go into a bowling alley there. (338) He then met Paito at the R&R Garage and Paito told him to deliver the car to Rafael Matos. (338-39)

Ramos acknowledged that because he was a witness in this case, he was not going to be prosecuted for any of the car thefts. (358) Additionally, he had been convicted of at least five felonies. (358)

RAFAEL MATOS testified that he had lived across the street from the R&R Garage. (569) At this time, Defendant Ortas owned

the garage but he observed Appellant Garcia and Defendant Baez working there. (574-75) When Defendant Ortas left the garage, Baez and Appellant Garcia took over its operation. According to Matos, he later met Paito and observed Paito bringing cars to the garage to be fixed. (580) He asked Paito if he needed another driver as he was out of work. Paito agreed to give him a job. (581) He would then go to Connecticut with two other men and go to parking lots to look for cars. (592) On their return trip, they would always stop at the R&R Garage. (596) Paito would pay him $50 a trip. (597-98)

Finally, this witness testified that on two or three occasions he observed Paito removing the vehicle identification numbers from cars. (630)

JUAN PEREZ, 23 years of age, testified that he knew Paito, Ortas, Appellant Garcia, and Baez. He had met Appellant Garcia and Baez at the R&R Garage. (733-34) When the garage was sold to Baez and Appellant Garcia, he stayed on as a mechanic. (738) He later met Paito who asked him if he wanted to go to Connecticut which he agreed to do. In Connecticut on Route 95 near Bridgeport, Paito told him to wait there in his car. Shortly thereafter, Paito returned with another car and directed Perez to drive it to Wales Avenue.

In the space of a year, he went to Connecticut with Paito about five to six different times and also went alone to Paito's friend's house to await the delivery of a car. (744)

He once heard Appellant Garcia telling Paito that he did not want to have anything to do with this. (755)

MIRIAM RIVERA, a resident of New York City, testified that on April 14, 1972 she bought a 1971 two-door gold and dark brown Dodge Swinger from Appellant Garcia at the R&R Garage on Wales Avenue.(114) Appellant Garcia, who told her that he owned the garage with another, personally showed her the Dodge which was inside the garage. Additionally, Appellant Garcia informed her that the owner of the car was in the army and was not available. Therefore, he had to wait for the registration. She eventually paid Appellant Garcia a total of $1,500 for the car and one week later she returned to the garage and was given receipts by Appellant Garcia. Before she removed the car from the garage, she registered it with the Motor Vehicle Bureau. (135)

On April 17, 1973, she turned the car in to the police. (140) She maintained that she did not know Appellant Garcia's name when she bought the car and only learned it later in court. He just told her that he was the owner of the car. (149)

Special Agents and police officers then testified to various searches of both the R&R Garage and the P&P Garage on Melrose Avenue.

SPECIAL AGENT JEFFREY HALL and AGENT BANTEL went to the P&P Auto Repair Shop on Melrose Avenue on March 8, 1973 and took photographs of a red over grey 1964 Cadillac which was parked in front of the shop. At this time, the Cadillac had New York license plates. (50-55)

On March 15, 1973, PATROLMAN JAMES TORREN seized this 1964 Cadillac from the Defendant Ortas which was in front of the P&P Auto Shop on Melrose Avenue. (63-64) His inspection of this car

revealed that the vehicle identification number which was stamped into the frame of the vehicle appeared to be "overstamped" above another number. (65) The Officer explained that VIN have been used by manufacturers since 1954 to identify their cars and car lines and to provide a true identity of the vehicle to which it is attached. (65) "Overstamped", according to this Officer, meant that there had been another number on the frame and a different number had been stamped over it. The original number on the Cadillac could not be ascertained but the "overstamped" number was visible. (66)

On April 17, 1973, PATROLMAN PATRICK PURCELL seized a 1967 Mercury Cougar from the R&R Garage which was in the possession of one Angel Villaneuva. (544) At that time Rafael Matos was the registered owner. (544) The Officer discovered that the vehicle had an altered VIN and the true VIN had been reported stolen. (545)

On August 13, 1973, SPECIAL AGENT HUTTON, PATROLMAN PURCELL, and SPECIAL AGENT BANTEL participated in a search of the R&R Garage. Two confidential vehicle identification plates were found in a brick wall and a bag of rivets was found in a drainpipe. (502,515) They also seized a 1957 Ford Thunderbird and discovered that the VIN had been altered and that it was a stolen car. (558) In the office of the garage, a book and a rivet affixer were found on top of a desk. (806, 815)

Thereafter, on October 4, 1973, Agent Bantel met LeCleres and seized a card from his person which had his name printed on it and the back of this card had the notation "Raffy Matos - Casa - 731-9635." (847)

Over the objection of all counsel, Appellant Garcia's Grand Jury testimony was offered by the Government only as against Garcia. (715-16)

Before the Grand Jury, Appellant Garcia had testified that he did not speak English and spoke only words like "thank you", etc. (718) He had an auto repair shop on Wales Avenue where he did both body work and paint jobs on cars. (718) He denied selling Miriam Rivera a car in 1971. (720) He stated that he had a problem with her since she thought that he had sold her a car but she had confused him with someone else. (720) He did not accept any money from her and would have remembered if he had. He did see a man sell her a car from the parking lot next door but this man did not work at his garage and could not be found. It was with this man that Ms. Rivera had him confused. (721-22)

Only Defendant LeCleres took the stand in his behalf. LeCleres, who is also known as Paito, testified that he is married, the father of two children, and has never been convicted of any crime. (984-85)

He first met Juan Perez in the summer of 1972 and Ramos in August of 1972. Perez introduced him to Ramos in front of his house on Cortland Avenue. (986) He met Matos in November of 1972 at his job at Casear's Auto Glass Co. where he would put windshields on cars. (987) Matos had asked if he could fix a 1967 Cougar that he had. (987) However, LeCleres responded that he could not because he worked Monday through Saturday and would spend Sundays with his family. (987) Matos said he would give LeCleres his phone number and wrote it on the back of a card which LeCleres had given him. (988) He never fixed a 1967 Mercury, nor did he ever change the

VIN on a 1967 Mercury, nor did Matos ever bring him such a car. (988)

LeCleres also denied paying Ramos money to steal cars for him nor did Ramos steal cars for him. (990) These men offered to sell him cars but he never accepted their offers. (991) Specifically, Ramos offered him a 1963 Cadillac for $50 in October of 1972. (991) Ramos had explained that he had bought the cars from old people in Connecticut. (992) He did not buy this car because it was not registered in Ramos' name and Perez had also alerted him to the fact that Ramos was stealing cars in Connecticut. (992) Ramos also tried to sell him marijuana.

LeCleres stated that he never accepted a 1964 Cadillac from Ramos or altered its VIN; he never accepted a 1967 Mercury Cougar or altered its VIN; he never accepted a 1971 Dodge Swinger or altered its VIN; and he never accepted a 1957 Ford Thunderbird or altered its VIN. (993-94)

LeCleres maintained that he met Defendant Baez in the beginning of the summer of 1972 at the R&R Garage when he brought his 1967 Corvette there for an estimate on a body and paint job. (1018) He never met Appellant Garcia but saw him at the garage when he picked up his car. (1019) He denied knowing the Defendant Ortas and stated that although he had seen him, he had never spoken with him. (1022) Defendant Ortas had gone to his place of employment to have a new windshield put on his Maverick. (1024)

HEARING TO SUPPRESS APPELLANT GARCIA'S GRAND JURY TESTIMONY

On May 16, 1974, a hearing was held prior to trial pursuant to Appellant Garcia's motion to suppress his Grand Jury testimony. (H.2)*

At the outset of this hearing, it was stipulated between the parties that Appellant Garcia was called as a witness before the Grand Jury on March 27, 1974, and that he was the target or one of the targets of that Grand Jury investigation; that he was assisted by an interpreter while he was questioned by Assistant United States Attorney, Mr. Buchwald; that he had another attorney present by the name of Ronald Gardner who remained outside of the Grand Jury room; and that when he was before the Grand Jury, he was asked certain questions and gave certain answers. (H.3)

The Grand Jury minutes established that in response to questions by the Government, Appellant Garcia first stated: "I have something here that my attorney gave me. He told me not to answer any questions that might incriminate me." Mr. Buchwald in turn responded, "Well, let me warn you of your rights, and if you want to speak, we will talk later on". (H.4, A.16)

The third page of the Grand Jury minutes reflects that Appellant Garcia again stated that his attorney told him not to answer questions if the questions might incriminate him. The Government, however, continued to ask questions and Appellant Garcia answered the questions through an interpreter. (H.5, A.17)

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*Numerical reference preceded by "H" refers to the pages of the Suppression Hearing dated May 16, 1974.

On page 6 of the minutes, Appellant Garcia was asked "Do you know a Mr. Pedro Ortas?" Appellant responded "With my attorney's advice I would like to answer, I would like please for you to read this." Whereupon he handed Mr. Buchwald a piece of paper and Mr. Buchwald replied, "Might the record reflect that the witness has handed me a small piece of white paper -- and to the interpreter -- to be read."

The interpreter stated "It says give your name and your address and then tell him that with advice of counsel you are not going to answer that question because should you answer it, it would accuse you of a crime." (H.5, A.19)

Appellant's counsel argued that from that point on the United States Attorney's office was on notice that Appellant Garcia was invoking his Fifth Amendment privilege and that all questioning should have ceased. (H.5) Counsel further pointed out that although Appellant Garcia continued to answer questions, he did not knowingly waive his Fifth Amendment rights. (H.6)

The Government rested on the record. (H.7)

In a written decision filed June 12, 1974, the court denied Appellant Garcia's motion to suppress his Grand Jury testimony. The court's decision is attached hereto in the Appendix, A.11-15.

ARGUMENT

POINT I

THE FAILURE OF THE COURT TO SUPPRESS APPELLANT GARCIA'S GRAND JURY TESTIMONY, WHICH WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION, CONSTITUTED REVERSIBLE ERROR.

Miranda v. Arizona, 384 U.S. 436 (1966) made it quite clear that once a suspect has insisted on his right to remain silent, the authorities may not undermine this right by repeatedly requesting him to abandon that right and to supply the desired information:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during the questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. 384 U.S. 436, 467.

While Miranda itself applied to post-arrest interrogations, it is submitted that it is far more egregious for the Government to insist that a defendant supply information before a grand jury that is making the crucial determination of whether an indictment should be returned against him especially when this defendant insists on his right to remain silent. Yet, that is precisely what occurred in this case.

At the very outset of his interrogation before the grand jury, Appellant Garcia attempted to invoke his Fifth Amendment privilege against self-incrimination. Non-conversant in the English language and requiring the assistance of an interpreter, he immediately showed the Assistant United States Attorney a slip

of paper that his attorney had given him. This slip of paper in no uncertain terms instructed Appellant Garcia to provide only his name and address and not to answer any questions that would in any way incriminate him. The Assistant United States Attorney, however, blatantly ignored the slip of paper and proceeded to advise him of his constitutional rights. When asked if he understood these rights, Appellant Garcia replied "Yes, I understand in part." (A.16) Without even asking which part he did not understand, the Government continued to advise him of his rights. Again, Appellant Garcia attempted to explain that his attorney instructed him not to answer any questions that might incriminate him. (A.17) At least at this point, the Government's interrogation should have ceased, but the Government instead persisted in asking its questions. Finally, when Appellant Garcia was asked if he knew a Pedro Ortas, he handed the interpreter the slip of paper indicating for a third time that he wished to remain silent. And for the third time, the Assistant United States Attorney ignored his efforts to invoke the Fifth Amendment.

There was no justification whatever on the face of this record for the Government's continued questioning of Appellant Garcia. As stated, Appellant was not at all conversant in the English language and needed the assistance of an interpreter throughout the entire proceedings. While it is true, that he was at various times permitted to consult with his attorney, this does not mean that Appellant, a layman who was non-conversant in both the law and the English language, was capable of accurately conveying to his attorney exactly what was transpiring in the grand jury room. Once Appellant brought it to the Government's attention that his

attorney had instructed him not to incriminate himself, it was incumbent upon the Government to at least speak with the attorney to ascertain that Appellant knew what he was doing while unassisted by counsel before the grand jury. Failing this, it cannot be said the Government met their burden of proving that Appellant Garcia voluntarily and knowingly relinquished his Fifth Amendment right against self-incrimination. Johnson v. Zerbst, 304 U.S. 458 (1934); Carnley v. Cochran, 369 U.S. 506 (1962).

The Court in refusing to suppress Appellant's grand jury testimony relied on this Court's decision in United States v. James, 493 F.2d 323 (2d Cir., 1974). The present case is clearly distinguishable from not only this case but from all the other cases of this nature. In the James case, the defendant was seeking a dismissal of the indictment because he had been questioned in violation of his Fifth Amendment privilege against self-incrimination. See also United States v. Winter, 348 F.2d 204 (2d Cir., 1965); Goldberg v. United States, 472 F. 2d 513 (2d Cir., 1973); Lawn v. United States, 355 U.S. 339 (1958). Here, Appellant Garcia is not seeking a dismissal of the indictment, he is not claiming that the evidence before the grand jury was insufficient to indict, nor is he asserting that the self-incrimination clause of the Fifth Amendment prohibits the summoning before a grand jury of one who is a potential defendant. Goldberg v. United States, supra; United States v. Mingoia, 424 F.2d 710 (2d Cir., 1970). Instead, Appellant Garcia is claiming only that his answers before the grand jury were obtained in violation of his Fifth Amendment rights and that the Government should not have been permitted to introduce the "fruits" of their

illegality against him at his trial.

It has been repeatedly held that any evidence gained as a result of the Government's own wrong cannot be utilized by it to secure a conviction. Wong Sun v. United States, 371 U.S. 471 (1963); Nardone v. United States, 308 U.S. 338 (1939); United States v. Tane, 329 F.2d 848 (2d Cir., 1964). Such a holding should be applied to the present case if the privilege against self-incrimination is to have any meaning.

In sum, the Court's failure to suppress Appellant Garcia's grand jury testimony which was obtained in violation of his Fifth Amendment privilege against self-incrimination constituted reversible error.

POINT II

PURSUANT TO THE FEDERAL RULES OF APPELLATE PROCEDURE, RULE 28 (i), ALL RELEVANT ARGUMENTS RAISED IN THE BRIEFS FOR THE OTHER APPELLANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND A NEW TRIAL ORDERED.

January, 1975

RESPECTFULLY SUBMITTED,

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A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

APP US COURT OF APPEALS

USA,

Appellee,

against

LE CLERES,

Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, James Steele, being duly sworn,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

250 West 146th Street, New York, New York

That on the 2nd day of Jan 1975 at Foley Square, New York

deponent served the annexed Appellant's Brief (Garcia) upon

Paul J. Curran

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Sworn to before me, this 2nd day of Jan 1975

James Steele

Print name beneath signature

JAMES STEELE

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975